No. 45795-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bobby Zimmerle,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00417-5

The Honorable Judge Marilyn Haan

Appellant's Reply Brief

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ARGUMENT

I. THE COURT VIOLATED MR. ZIMMERLE'S CONSTITUTIONAL RIGHTS BY ACCEPTING HIS GUILTY PLEAS WITHOUT AN ADEQUATE FACTUAL BASIS AND BY DENYING HIS REQUESTS TO PROCEED *PRO SE*.[1]

A. The court deprived Mr. Zimmerle of his constitutional rights to self-representation and to access to the courts.

A trial court cannot deny an accused person the constitutional right to self-representation on the ground that it would be detrimental, or because the defendant lacks technical legal knowledge. *Faretta v. California*, 422 U.S. 806, 834, 836, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 505, 229 P.3d 714 (2010). Still, the state argues at length that Mr. Zimmerle's request to represent himself was equivocal because he did not demonstrate that he understood the correct procedure for entry of a guilty plea or his standard sentencing range. Brief of Respondent, pp. 5-9. This argument lacks merit for two reasons.

First, Respondent does not explain how Mr. Zimmerle's lack of technical knowledge rendered his request equivocal. Indeed, Mr.

[1] The state argues that Mr. Zimmerle's claims regarding the violation of his right to self-representation should not be addressed following his guilty plea. Brief of Respondent, pp. 9-10. On December 10, 2014, however, the court granted Mr. Zimmerle's motion to amend his Notice of Appeal. Ruling (12/10/14). The amended Notice of Appeal specifically addresses the court's rulings denying Mr. Zimmerle's motions to proceed *pro se*. Amended Notice of Appeal. Accordingly, the issues are properly before this court.

Zimmerle repeated his request to proceed *pro se* numerous times, on two different days, and without any hesitation or qualification. RP 2-3, 6-7.

Second, the state's argument ignores the Washington and United States Supreme Courts' clear admonitions that an accused person does not need to demonstrate legal knowledge in order to exercise the right to self-representation. *Faretta*, 422 U.S. at 834, 836; *Madsen*, 168 Wn.2d at 505.

Instead of asking Mr. Zimmerle whether he understood the consequences of waiving his right to an attorney, the court "stacked the deck" against him by asking questions designed only to demonstrate his lack of technical legal knowledge. *See e.g. Madsen*, 168 Wn.2d at 506. The trial court improperly conflated legal acumen with a knowing, voluntary, and intelligent decision to proceed *pro se*. The state repeats the same error. Because the trial court failed to conduct conduct a meaningful colloquy, the appellate court must presume that Mr. Zimmerle made a knowing, intelligent and voluntary decision to proceed *pro se*. *Id.* The court abused its discretion by failing to grant Mr. Zimmerle's request. *Id.*

The court must also provide a *pro se* defendant with the materials reasonably necessary for self-representation. *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (*citing Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)). Failure to provide such access violates the right to self-representation:

> The right of self-representation guaranteed in our state constitution is a substantive right, not a mere formality. Just as the right to appointed counsel is not satisfied unless the representation is meaningful, the right to represent oneself cannot be satisfied unless it is made meaningful by providing the accused the resources necessary to prepare an adequate pro se defense.

State v. Silva, 107 Wn. App. 605, 620, 27 P.3d 663 (2001).

Both *Bebb* and *Silva* hold that the court satisfied this requirement by providing *pro se* defendants with standby counsel to provide research materials and technical assistance. *Bebb*, 108 Wn.2d at 518; *Silva*, 107 Wn. App. at 609.

Here, the state does not claim that Mr. Zimmerle was given the materials necessary to represent himself. Brief of Respondent, p. 8. Instead, Respondent argues that the state – not the court – must provide those materials. Brief of Respondent, p. 8. This is incorrect for two reasons. First, the state's argument is foreclosed by *Bebb* and *Silva.* In those cases, the court, not the state, provided the accused with the necessary standby counsel.

Second, even if Respondent were correct, the record does not show that the state provided Mr. Zimmerle with the necessary plea form either. The end result is the same: Mr. Zimmerle was deprived of his constitutional right to represent himself because he was unable to access

the necessary form and legal information. *Bebb*, 108 Wn.2d at 524; *Silva,* 107 Wn. App. at 620.

The court entered Mr. Zimmerle's guilty pleas in violation of his constitutional right to self-representation and to meaningful access to the courts. *State v. A.N.J.*, 168 Wn.2d 91, 120, 225 P.3d 956 (2010); *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009); *Madsen*, 168 Wn.2d at 505-06; *Silva,* 107 Wn. App. at 620. Mr. Zimmerle must be allowed to withdraw his guilty pleas. *Id.*

B. The trial court's failure to adequately develop the factual basis for Mr. Zimmerle's guilty pleas renders the pleas constitutionally invalid.

A guilty plea is involuntary unless supported by a sufficient factual basis. *State v. S.M.*, 100 Wn. App. 401, 414, 996 P.2d 1111 (2000); *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006). This requirement is distinct from the prerequisite that the accused understand the elements of the alleged offense:

> A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements…Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea.

R.L.D., 132 Wn. App. at 705-06 (*citing In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983), *aff'd* 108 Wn.2d 579, 741 P.2d 983

(1987); *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969); *State v. Chervenell*, 99 Wn.2d 309, 317-18, 662 P.2d 836 (1983)).

Here, the state does not argue that the record includes a factual basis for either offense. Brief of Respondent, pp. 10-13. Respondent's failure to argue that issue may be treated as concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, the state erroneously claims that a guilty plea need not set forth a sufficient factual basis. Brief of Respondent, pp. 10-11. (*citing In re Hilyard*, 39 Wn. App. 723, 725, 695 P.2d 596 (1985)). Respondent ignores decisions issued since *Hilyard* was decided. *Hilyard* has been overruled *sub silentio* by *R.L.D., S.M.,* and the state and federal Supreme Court opinions upon which those decisions were based.

The record does not include a factual basis for Mr. Zimmerle's pleas. It therefore fails to demonstrate that he understood whether or not his alleged conduct satisfied the elements of each offense. His pleas were not knowing, voluntary, and intelligent. *R.L.D.*, 132 Wn. App. at 705. Mr. Zimmerle must be permitted to withdraw his guilty pleas. *Id.* at

II. THE COURT VIOLATED MR. ZIMMERLE'S RIGHT TO COUNSEL BY ORDERING HIM TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY WITHOUT FIRST DETERMINING THAT HE HAD THE PRESENT OR FUTURE ABILITY TO PAY.

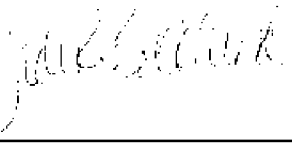
Mr. Zimmerle relies on the argument set forth in his Opening Brief.

CONCLUSION

For the reasons set forth above and in Mr. Zimmerle's Opening Brief, Mr. Zimmerle must be permitted to withdraw his guilty pleas.

Respectfully submitted on January 8, 2015,

BACKLUND AND MISTRY



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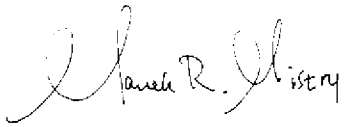

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CERTIFICATE OF SERVICE

I certify that on today's date:

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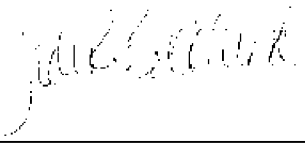
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 8, 2015.



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January 08, 2015 - 2:11 PM

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